FORM NLRB-4477
(7-95)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN HOME HEALTH, INC.[1/]

Employer

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Petitioner

Case 5-RC-15051

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2/]

3. The Petitioner involved claims to represent certain employees of the Employer.[3/]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act:[4/]

All full-time and regular part-time Certified Nursing Assistants employed by the Employer out of its Suffolk and Virginia Beach, VA facilities, but excluding all other employees, licensed professional and technical employees, office clerical employees, guards, watchmen and supervisors under the Act.

DIRECTION OF ELECTION

An Election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an

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economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility,* 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **AUGUST 24, 2000.**

Dated August 10, 2000

at Baltimore, Maryland

/S/ STEVEN L. SHUSTER
Acting Regional Director, Region 5

1/ The name of the Employer appears as amended at the hearing.

2/ In Home Health, Inc. (herein the Employer) is a Minnesota corporation, engaged in the business of providing home health care at various locations in Suffolk and Virginia Beach, Virginia. At the hearing, the parties stipulated and I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3/ The parties stipulated and I find that the International Longshoremen's Association, AFL-CIO, (the Union) is a labor organization within the meaning of the Act.

4/ The Union is seeking to represent employees in the following unit:

> All full-time and regular part-time Certified Nursing Assistants employed by the Employer out of its Suffolk and Virginia Beach, VA facilities, but excluding all other employees, including licensed professional and technical employees, office clerical employees, guards, watchmen and supervisors under the Act.

The parties stipulated at the hearing that an appropriate unit encompasses both locations, Suffolk, Virginia and Virginia Beach, Virginia. At the hearing the Union took the position that the appropriate unit is as stated in the petition. While the Employer does not disagree with the categories of employees excluded from the unit, the Employer disputes the description of the Certified Nursing Assistants (CNAs) as "full time and regular part-time." Rather, the Employer contends that the appropriate unit description is all "active" Certified Nursing Assistants (CNAs) employed by the Employer at its Virginia Beach and Suffolk, Virginia locations. At the hearing, the Employer defined "active" CNAs as CNAs who have worked within the preceding six months, and have not been terminated, de-activated, or voluntarily resigned their employment. In the Employer's requested unit there are 151 "active" CNAs while in the Union's proposed unit there are approximately 75 – 95 CNAs. The parties stipulated that there is no history of collective bargaining between the Union and the Employer and that there are no bars to the conduct of an election.

The issue in this case is what formula should be applied in determining who is eligible to vote. Both parties agree that the unit should be composed of CNAs, but disagree as to the eligibility period and the number of hours worked during that period in deciding which CNAs can vote. The Employer contends that all "active" CNAs should be eligible to vote. The Employer's alternative position is that CNAs who had worked an average of four hours per week in either of the first two quarters of 2000 would be eligible to vote. The Union contends that it is appropriate to apply the Davison-Paxon formula to this case. Both parties submitted post-hearing briefs.

Employees classified as CNAs work in the Employer's extended hours department, the hospice division and the visit division, where they generally perform similar duties. CNAs are assigned jobs from the Employer's Virginia Beach and Suffolk Virginia, facilities, to work in the clients' homes where they are responsible for the performance of personal care activities such as bathing, dressing, assisting clients with transfers, toileting, medication reminders, light housekeeping chores, and meal preparation.

There are no CNAs designated as full-time by the Employer. Rather, they are designated as part-time employees and are called on an as-needed basis, based on assignments or referrals made by physicians, discharge planners, hospitals, clients' families or other employees. These referrals are received by the intake referral nurse. To satisfy these referrals, the intake referral nurse makes calls from a list of "active CNAs." While CNAs may decline an assignment, if an employee has not been available to work for approximately six months, or sometimes less, he or she may be "deactivated" or removed from the list. In some instances, however, a CNA may continue to be called even after a recommendation has been made to "deactivate" the CNA due to unavailability. In other instances, some CNAs may be permitted to remain active despite the fact that they have requested a short leave of absence for a week or two. At the hearing, the parties entered into a stipulation that a CNA is "deactivated" if his or her employment is terminated.

The record testimony established that the number of intake referrals received by the Employer varies from month-to-month and that this causes the Employer's business to fluctuate. Thus, the need for CNAs is commensurate with the number of referrals. Similarly, the number of hours worked by the CNAs fluctuates based on the volume of the Employer's business at any given time. The record testimony established that there are "active" CNAs working consistently from 12 to 40 hours per week. Prior to July 10, 2000, there were approximately 75 CNAs consistently working between 12 and 40 hours per week out of the Employer's Virginia Beach location and about 20 to 25 CNAs consistently working from 12 to 40 hours per week out of the Employer's Suffolk location. In addition, there are regularly active CNAs who average less than 15 hours per week. While some CNAs may work over 40 hours per week, others may work only five to ten hours per week.

Based upon the record as a whole, I conclude that the evidence failed to establish special circumstances warranting the application of an eligibility formula other than the Davison-Paxon formula. To support its argument that the Davison-Paxon formula ought not be applied in this case, and that the Employer's proposed "active-inactive" distinction should be used instead, the Employer relies on Berlitz School of Languages of America, 231 NLRB 766 (1977), a case in which the appropriateness of the Davison-Paxon eligibility formula was not at issue. Rather, in that case, the Board disagreed with the Regional Director's eligibility formula, which limited eligibility to those teachers who taught on at least one occasion in the six months preceding the issuance of the Decision and Direction of Election. Instead, the Board applied a 1-year cutoff to eligibility as well as required that teachers taught on more than one occasion during that time period.

As for the Employer's proposed "alternate quarter" eligibility formula, I find that the evidence is insufficient to establish that such an alternate formula is warranted under the circumstances of this case. Thus, I conclude that the Davison-Paxon eligibility formula should be applied in this case and that any CNA who regularly averages 4 hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest in the unit and may vote in the election. See Davison-Paxon Company, 185 NLRB 21 (1970).